

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIX JAVIER LOPEZ,

Defendant and Appellant.

E055472

(Super.Ct.Nos. INF1101671
& INF1101765)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas N. Douglass, Jr., Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Robert V. Vallandigham, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Felix Javier Lopez is serving three years in county jail after pleading guilty in November 2011 to four vehicle thefts that took place in June and July of 2011. Defendant asserts, the People concede, and this court agrees, that defendant is entitled to additional days of credit under Penal Code section 4019.¹

PROCEDURAL BACKGROUND

On November 22, 2011, defendant pled guilty in case No. INF1101671 to three counts of unlawfully taking a vehicle with a prior conviction for the same offense (Pen. Code, § 666.5, subd. (a); Veh. Code, § 10851, subd. (a)) and admitted he had two prison priors (Pen. Code, § 667.5, subd. (b)). Defendant committed these crimes on June 8, June 30, and July 10, 2011. On the same day, he pled guilty in case No. INF1101765 to another count of unlawfully taking a vehicle with a prior conviction for the same offense. Defendant committed this crime on July 26, 2011.

In case No. INF1101671, the trial court sentenced defendant to three years in county jail plus three years on supervised release, for a total of six years in custody. Defendant received credit for 127 days of actual custody and 62 days of conduct credit under section 4019. In case No. INF1101765, the trial court sentenced defendant to a concurrent term of three years in county jail. Defendant received 120 days of actual credit and 60 days of conduct credit.

¹ All section references are to the Penal Code unless otherwise indicated.

As to both cases, the trial court sentenced defendant to county jail instead of state prison under the Criminal Justice Realignment Act of 2011 (Realignment) (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 12.2). (§ 1170, subd. (h).)

On January 4, 2012, after a hearing, the trial court denied defendant's oral motion that he should receive one-for-one conduct credits in county jail rather than one-for-two credits. This appeal followed.

DISCUSSION

Defendant argues he is entitled to additional conduct credits because his county jail sentence under Realignment denied him conduct credits he would have received if he had been sentenced to state prison. He contends he is entitled to one-for-one conduct credits under the former section 2933, subdivision (e)(1), and that denying him these credits violates the prohibition against ex post facto laws. The People concede that defendant is correct, and this court agrees.

In October 2009, the Legislature passed Senate Bill No. 18, which amended section 4019 to allow certain eligible defendants to earn two days of conduct credit for every two days of actual custody. This change became effective January 25, 2010. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.)

In September 2010, the Legislature passed Senate Bill No. 76 (SB 76), which again amended section 4019 and also amended section 2933. (Stats. 2010, ch. 42, § 2.) Under this bill, defendants were eligible for conduct credits at a rate of two days for every six days of actual custody time. (Former § 4019, subds. (b) & (c).) These decreased credits were applicable only to defendants who committed crimes on or after

the statute's effective date of September 28, 2010. (Former § 4019, subd. (g).) SB 76 also added former section 2933, subdivision (e)(1), which provided that "a prisoner sentenced to the state prison under Section 1170 . . . shall have one day deducted from his or her period of confinement for every day he or she served in county jail . . . from the date of arrest until state prison credits pursuant to this article are applicable"

In April 2011, the Governor signed the Realignment legislation, which allows trial courts to sentence defendants convicted of certain felonies to serve their term in county jail rather than state prison. (§ 1170, subd. (h).)

In addition, sections 4019 and 2933 were again amended as part of the Realignment legislation. Defendants convicted after October 1, 2011, would once again earn two days of credit for every two days served in custody. (§ 4019, subds. (f) & (h).) The Legislature also amended section 4019, subdivision (g), clarifying that the changes made by SB 76 still apply to defendants in custody for crimes committed after the September 28, 2010, effective date of SB 76. (§ 4019, subd. (g).) Also, section 4019, subdivision (h) states that, "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." Finally, section 2933, subdivision (e)(1), was deleted.

These changes under Realignment reduced the amount of conduct credits inmates earn who committed their crimes between September 28, 2010 and October 1, 2011, and were sentenced to county jail. Defendant fits right within these parameters, as he committed his crimes in June and July of 2011.

In *Weaver v. Graham* (1981) 450 U.S. 24 (*Weaver*), overruled in part on another point as stated in *People v. Helms* (1997) 15 Cal.4th 608, 616, the United States Supreme Court examined a Florida statutory amendment that changed the amount of conduct credits an inmate could earn. (*Id.* at p. 26.) Before the amendment, inmates could earn five days a month for the first and second years of the sentence, 10 days for the third and fourth years, and 15 days for the fifth and subsequent years. (*Ibid.*) Under the amendment, inmates could only earn three days a month for the first and second years, six days for the third and fourth years, and nine days for the fifth and subsequent years. (*Ibid.*) Florida applied the amendment to all inmates, including Weaver, whose offense took place before the enactment of the amendment. (*Id.* at pp. 27, 31.)

The Supreme Court concluded that, for inmates who committed crimes before the amendment's enactment, the change in the statute "substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] 'the quantum of punishment.' " (*Weaver, supra*, 450 U.S. at p. 33.) Because the amendment "constrict[ed] the inmate's opportunity to earn early release, and thereby [made] more onerous the punishment for crimes committed before its enactment," it violated the ex post facto clause. (*Id.* at pp. 35-36.)

Here, the effect on defendant of the Realignment amendments was to prevent him from earning one-for-one credits under the former section 2933, subdivision (e)(1), which was the law in effect when he committed each of the four crimes, and instead would have resulted in him earning credits at a lower rate. Like the amendment at issue in *Weaver*,

“[t]his result runs afoul of the prohibition against *ex post facto* laws.” (*Weaver, supra*, 450 U.S. at p. 36.)

For this reason, defendant is entitled to relief on ex post facto grounds.

DISPOSITION

The judgment is modified to award defendant an additional 65 days of presentence conduct credit in case No. INF1101671, and an additional 60 days of presentence conduct credit in case No. INF1101765. The judgment, as modified, is affirmed. The trial court is directed to amend the sentencing minute order and forward a copy to the Riverside County Sheriff’s Department.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.